# *Discipline, Interpretation, and Enforcement (DIE) Board Ruling of the Board*

## (1) HEARING DETAILS

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| **Style of Cause:** | Request from CRO to specify campaign manager restrictions |
| **Hearing Number:** | Ruling #3, 2009/2010 |
| **Hearing Date:** | February 25, 2010 |
| **DIE Board Panel Members:** | Paul Chiswell, Associate Chief Tribune, Chair;<br>Alexander Witt, Tribune;<br>Kurtis Streeper, Tribune; |
| **Appearing for the Applicant:** | Jennifer Huygen, Chief Returning Officer, Students' Union |
| **Appearing for the Respondent:** | N/A |
| **Intervener(s):** | Jon Osborne;<br>Beverly Eastham;<br>Janelle Morin; |

## (2) QUESTION FOR INTERPRETATION

The Chief Returning Officer of the Students' Union (the "CRO") made an application to the D.I.E. Board (the "Board) pursuant to Bylaw 1500 sections 3(b), 4(b)(iii) for a hearing requesting an interpretation of Bylaw 2000, *Elections, Plebiscites and Referenda Bylaw*.

The CRO asked the following question:

> "Does Bylaw 2000 permit candidates, slates and sides to seek endorsements from "public figures" who are not students at the University of Alberta (ie. professors, administration or staff, government officials, activists - all on both a local, national, and international level)? If so, what forms of endorsement are acceptable? To what extent are endorsements – particularly those that are likely to attract a great deal of public attention - considered third-party campaigning and to what extent is this allowable?"

## (3) POSITIONS OF PARTIES

In addition to hearing from the applicant, the CRO, the Board accepted the application of three people to serve as interveners: Jon Osborne, as the Campaign Manager for Millennium Villages YES; Beverly Eastham as the Campaign Manager for UPASS YES; and Janelle Morin as a member of the Students' Union. The following is a summary of their submissions to the Board.

**CRO**

The CRO was unsure what provisions of Bylaw 2000 would be violated by endorsements of election campaigns by public figures. She expressed concern that "public figures" might disturb the level playing field the CRO believes Bylaw 2000 was intended to create. The concern extends to whether all members of the Students' Union have equal opportunity for connections to "public figures". The CRO conceded that there is no bylaw directly preventing anyone from contacting a public figure and seeking their endorsement. Further, as the 2010 election has already begun, the CRO is concerned that a change in the position towards "public figure" endorsements would provide an unfair advantage to campaigns that prepared endorsements in advance compared to those that did not under the assumption that they were prohibited.

The CRO made reference to section 39 of Bylaw 2000 which governs endorsements. Section 39 states:

> 39. Endorsements
> (1) No candidate shall
> a. act as a volunteer for another candidate; or
> b. endorse another candidate within his or her own race.
> (2) Any member with the exception of the C.R.O, the D.R.Os, candidates, and incumbent members of the Executive Committee shall be free to act as volunteers for or endorse any candidate, or slate.
> (3) Regulations regarding the endorsement of electoral candidates by Students' Union employees not referenced in Section 39.(2) shall be subject to the Students' Union operating policy.
> (4) Incumbent members of the Executive Committee and the incumbent Board of Governors Representative are allowed to endorse sides in a Students' Union election.

However, the CRO opined that section 39 does not govern endorsements from people who are not members or employees of the Students' Union.

The CRO also acknowledged that endorsements from public figures could be beneficial to Students' Union elections by providing greater publicity for the campaigns and the election in general.

The CRO also submitted that section 37 of Bylaw 2000 could provide an answer to the question she submitted. Section 37(a) prohibits the use of resources that are not available to all candidates. It states:

> 37. No-Use of Non-Universal Resources
> No individual candidate, side or slate shall make use of any resource that is not
> a. available to all candidates, sides and slates;

**Jon Osborne**

Mr. Osborne made a brief statement with three principal arguments. First, a campaign's access to public figures for endorsements shows a candidate's or side's effectiveness, providing evidence to voters of their ability to be heard by a wider audience. Second, the nature of the endorsement provides a signal to voters about the nature of the campaign's values. Third, Bylaw 2000 is not merely about ensuring a level playing field. The Bylaw allows campaigns to display some sort of merit, and the ability of a campaign to secure endorsements can serve as a proxy for merit, if not a display of merit itself.

**Beverly Eastham**

Ms. Eastham submitted that there was a common understanding amongst students (albeit not all, but at least amongst Students' Council) that the spirit of Bylaw 2000 and the general conduct of past elections was to prohibit endorsements by people outside the Students' Union, including by "public figures". It was her submission that there was a gap in Bylaw 2000 and that this allowed the CRO (and the Board on appeal from the decision of the CRO) to fill the gaps of Bylaw 2000 during an ongoing election.

She further stated that the spirit of the Bylaw is that campaigns should focus on the issues, and not on who is the most popular. She would prefer to have campaigns focus on how they will impact students and not their ability to get big name endorsements.

Further, she argued that since the election began with the common understanding amongst all candidates and sides that endorsements were not permitted, that it would be unfair to allow them now. The Consequence of allowing "public figure" endorsements this late in the campaign would catch some campaigns unprepared and without the endorsements they may have otherwise secured.

**Janelle Morin**

Ms. Morin submitted that section 42(1)(a) of Bylaw 2000 was a full answer to this request for interpretation. Section 42(1)(a) states:

> 42. Forbidden Campaign Materials
> (1) The C.R.O. shall not approve campaign materials that
> a. have more than a nominal value when distributed;

Ms. Morin suggested that an endorsement was a campaign material of greater than nominal value and was therefore forbidden.

The Board appreciated the submissions of the CRO and the interveners.

## (4) DECISION

## The following are the reasons of Chiswell, Associate Chief Tribune:

**Section 39 - Endorsements**

As the CRO acknowledged, section 39, which governs endorsements, does not expressly preclude those outside of the Students' Union from endorsing a campaign. Nor does the Board find any evidence that section 39 implicitly precludes those outside of the Students' Union from endorsing a campaign.

**Section 37(a) - No-Use of Non-Universal Resources**

The CRO submitted that section 37(a) provided a full answer to the question. The section prohibits the use of resources that are not universally available, and states:

37. No-Use of Non-Universal Resources
No individual candidate, side or slate shall make use of any resource that is not
a. available to all candidates, sides and slates;

For section 37 to be applicable would require those willing to endorse campaigns to be resources that are not universally available. An endorsement is only effective if given to one side, and is unavailable to the other. Likewise, the person who gives the endorsement to one campaign is unlikely to give an endorsement to the other campaigns.

But this does not mean that those endorsing campaigns and endorsements are non-universally available resources. The Board finds that the word "resources" in section 37 does not extend to endorsements. Although, the word "resources" is not defined in the Bylaw, an analogy between endorsements (or those doing the endorsing) can be drawn to campaign managers. Campaign managers are a valuable resource in any campaign. Once a campaign has secured a campaign manager, no other campaign can use that same campaign manager. However, that does not make the campaign manager a non-universal resource. The same must follow for endorsements.

Further, the Board rejects the suggestion that section 37 be interpreted in a fashion that requires determining how "available" the person endorsing campaigns was to campaigns seeking endorsements, since it would be extremely difficult and arbitrary to have the CRO or the Board pass judgment on how "available" a person was to any particular campaign desiring to seek their endorsement.

**Section 42(1)(a) – Forbidden Campaign Materials**

The Board does not agree with Ms. Morin's submission that section 42(1)(a) prohibits endorsements. Section 42(1)(a) states:

42. Forbidden Campaign Materials
(1) The C.R.O. shall not approve campaign materials that
a. have more than a nominal value when distributed;

Ms. Morin's submission, as the Board understood it, was that an endorsement is a campaign material. The term "campaign materials" is defined in section 2(t), which states:

t. "campaign materials" shall be any physical or electronic media produced or distributed as part of campaign activities;

This definition does not prohibit endorsements that are communicated through means other than physical or electronic media, such as a campaign stating that they are supported by X, Y, and Z.

Only campaign materials that "have more than a nominal value when distributed" are prohibited by section 42(1)(a). The term "nominal value" is not defined; however, Ms. Eastham offered the following example that the Board finds quite helpful. Campaign posters have no value outside the election and are therefore of nominal value. Golf balls with a candidate's name printed on them have value outside of the election and thus have more than nominal value. The former is not prohibited under section 42(1)(a) and the latter is.

This question requires the Board to determine whether an endorsement reproduced on campaign materials (say in video or poster form) has value outside of the election. A campaign endorsement does not. The sole purpose of an endorsement is for the election and outside the election it has nothing more than nominal value. Therefore endorsements are not governed by section 42(1)(a).

**Endorsements are permitted**

Much has been made during the hearing about the "spirit of Bylaw 2000" that the Board has felt it necessary to make some brief comments on the matter. Although the spirit of the Bylaw when read as a whole can be used to help interpret the Bylaw's provisions, it does not permit the CRO, the Board, or anyone else to make new rules not provided for in the Bylaw.

As the D.I.E. Board has previously stated, a prime function of Bylaw 2000 is to ensure a fair election that provides each candidate or campaign side an equal opportunity to convince voters of their position's merit. Ruling 1, 2008/2009 states:

> Students' Council's intent in passing Bylaw 2000[...] was to create fair elections and to ensure that each candidate or side has an equal opportunity to campaign. An example of the Bylaw demonstrating this intent would be the limiting of campaign funds provided to each candidate and side during the official election campaign, and the prohibition from using additional funds as outlined in section 47. Likewise, a precampaigning period is imposed to prevent a candidate or side from using additional funds, time, publicity, etc, to gain an advantage over the other candidates or sides prior to the commencement of the election campaign.

Although the Board is moved by those who submitted that permitting endorsements by those outside of the Students' Union would render an unfair result, it must be remembered that the Board does not make the bylaws, Students' Council does. The Board's role is to interpret the bylaws passed by Students' Council. The Board does not have the jurisdiction to "fill in the gaps" of the bylaws, especially here, when it is not clear that there is a gap.

Further, producing fair elections was not Students' Council's only intent in passing Bylaw 2000. It must be remembered that Bylaw 2000 provides for elections and referendums. It is important that campaigns be able to communicate their position to voters and provide information to voters. This is done in part through provisions allowing for forums, websites, social media, posters, etc. Endorsements are another way in which voters can be informed about a particular campaign or side.

In addition, it must not be forgotten that Canada is a free and democratic society that places a premium on freedom of expression, and the bylaws must be interpreted in that light.

For these reasons, campaigns must be viewed as being able to engage in any election activities, such as seeking endorsements, unless the bylaws specifically prevent them. Since the Students' Union bylaws do not prohibit the use of endorsements from those outside of the Students' Union, they must be permitted.

In light of the submissions before the Board, it is important to note that the Board cannot render its decisions based on a "common understanding" of the bylaws held by certain members of the Students' Union. This is true even if the understanding is common to those on Students' Council. The Board's role is to interpret the intent of Students' Council through the provisions of the bylaws –

the understanding of members of Students' Council is not equivalent to Students' Council's intent as expressed in the bylaws. This is especially true in bylaws providing for elections and referendums. For example, referendums are designed to hear directly from all members of the Students' Union on a particular issue, with the express intent of bypassing Students' Council. Members must be able to determine in advance how to run a campaign for a side even if they do not possess the same common understanding as members of Students' Council.

Likewise, this ruling does not create an unfair result because some campaigns began the election with an opposite interpretation of the bylaws. The bylaws represent part of the law which governs the Students' Union and members are expected to know the law, including the proper interpretation of the bylaws. An opposite result would penalize those who properly interpreted the bylaws. The bylaws provide mechanisms for students to seek interpretations, such as this ruling, if there is any ambiguity.

**Endorsements must still comply with the other provisions of Bylaw 2000**

This ruling comes with many caveats. The first is that despite the Board found nothing to prevent someone from outside the Students' Union from endorsing a campaign, campaigns must still comply with the all of the bylaws. A statement on campus by someone endorsing a campaign appears to be free game, as does a campaign stating that they are supported by certain persons, including "public figures".

But other provisions limit the use of endorsements.

For example, section 43 prohibits the use of external media by a campaign. Section 43 states:

> 43. Media
> All candidates and sides are free to pursue campus-based media as determined by the C.R.O; however, are restricted from contacting external media sources. All external media must be directed through the C.R.O office.

Therefore if someone were to provide their endorsement to a campaign via external media, the campaign would likely be in violation of section 43. This is the case through the operation of section 35 which requires that campaigns ensure that their volunteers comply with the rules governing elections.

> 35. Requirements of All Candidates and Plebiscite/Referendum Sides
> Each candidate, campaign manager and slate shall act reasonably and in good faith, and specifically shall
>
> b. ensure that each volunteer is in compliance with all bylaws, rules, regulations, and orders while engaging in campaign activities on his/her/its behalf; and

Another important example of Bylaw 2000 restricting the use of endorsements is through sections 51, 54, and 56. Sections 51 and 54 limit the total expenses that a campaign may spend during an election. Section 56 requires that products or services received by a campaign be assessed according to fair market value. Section 56(1) states that:

> 56. Fair Market Value

> (1) Where a product or service has been provided to a candidate, side or slate for no consideration or for consideration that is less than the official list price of the service provider, that candidate, side or slate shall be considered to have incurred a campaign expense at the fair market value of that product or service, as determined by the C.R.O.

Therefore, if an endorsement takes the format of a video, website, a song, or is reproduced on a poster, the cost of those means of communication of the endorsement must still be assigned to the campaign.

The CRO has the wide discretion to determine the market value of the product or service, per section 56(3), which states:

> (3) The fair market value shall be determined by the C.R.O. using the price that any other candidate, side or slate would have to pay for a comparable product or service as a guideline.

Considering this is a request for interpretation and the Board has no facts before it, the Board must leave it up to the CRO to determine the cost associated with the method use to communicate an endorsement. However, two qualifying observations should be made. First, unless the person providing the endorsement is in the business of providing endorsements for valuable consideration, no attempt should be made to assess the market value of the person providing the endorsement, or of having the person provide the endorsement. Second, endorsements communicated through a medium created by the person providing the endorsement will typically have a higher market value than one produced by the campaign, and the CRO should not refrain from assessing the total production value of the medium of communication, even if it is greater than the campaign's entire budget.

The CRO raised other concerns in her written application for a request for interpretation. For example, the concern that a professor might use their access to class lists in endorsing a side could be resolved under the provisions of section 37 (no use of non-universal materials). Another example provided by the CRO is that a public figure might make use of their access to media to "publicly endorse a candidate or side themselves." This can be resolved per the discussion of media and section 34 above. Another example is that a Faculty of the University might become involved in a referendum. This can be resolved using sections 35 (requirements of all candidates and sides), 36 (third party activities), and 56 (fair market value), as well as the definitions of "volunteer" and "campaign activities" in section 2.

The second caveat to this ruling is that it is a request for interpretation. It is therefore not binding on anyone, including the CRO. The CRO, and her office, is free to make their own interpretation of Bylaw 2000 that may differ entirely or in part with this ruling. If or when the CRO makes a decision, that decision is binding unless appealed to the Board. This interpretation by the Board will not bind a Board panel hearing on appeal from the CRO's decision. It may be influential and persuasive, but it is not binding. Campaigns should govern themselves accordingly, cognizant of the potential that this ruling might not be an accurate or final interpretation of the bylaws.

## The following are the reasons of Streeper, Tribune:

I concur with the reasons of my colleague, the Associate Chief Tribune, Mr. Chiswell.

## The following are the reasons of Witt, Tribune:

I concur with the reasons of my colleague, the Associate Chief Tribune, Mr. Chiswell.

## (5) CONCLUSION

Campaigns are permitted to seek endorsements from those outside the Students' Union. However, campaigns must meet the other requirements of Bylaw 2000 when communicating those endorsements.